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APR 19 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning	)	
the Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the	)	
Communications Act of 1934, as amended	)	

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COMMENTS OF THE STATE OF HAWAII

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EXECUTIVE SUMMARY

In its initial comments, the State of Hawaii ("State") comments upon the Commission's proposal for implementing new Section 254(g) of the Communications Act. In adopting Section 254(g), Congress has codified and expanded upon the scope of the Commission's longstanding geographic rate averaging and rate integration policies. Specifically, Congress has made it clear that these policies apply to all interexchange carriers and services, and that they are essential elements of Congress's plan for promoting universal service, at just and reasonable rates, as additional competitive forces are unleashed. If properly enforced, geographic rate averaging and rate integration will ensure that all Americans, irrespective of where they live, benefit from increased interexchange competition.

The Notice, however, proposes an inadequate mechanism for enforcing Section 254(g). The Notice tentatively concludes that carriers only should certify as to compliance with 254(g) and be subject to complaint proceedings under Section 208 of the Act. If the Commission adopts this proposal and also allows the detariffing of interexchange services, realistically, consumers will be deprived of any means of ascertaining whether they are obtaining the benefits of rate averaging and rate integration which Congress intended them to enjoy. Under the Notice's proposal, how can a consumer in Hawaii ascertain whether his or her interexchange carrier is violating Section 254(g) by offering regionally discriminatory rates to consumers on the East coast? To effectively enforce Section 254(g), the State urges the Commission to, at a minimum, adopt an annual reporting requirement which would pro-actively detect and deter violations of Section 254(g).

The State also urges the Commission not to relieve AT&T of its October 1995 commitments with respect to geographic rate averaging of residential direct dial service and to rate integration. The statutory provision does not provide for exceptions from either rate averaging or rate integration. As to geographic averaging, to the extent one relies in the legislative history, that history indicates (1) that any carrier's effort to deaverage rates must be measured against the three-part public interest standard set forth in new Section 10 of the Communications Act, and (2) that deaveraging is appropriate, if at all, only in limited situations. Thus, any deaveraging attempt by AT&T should be analyzed in a thorough notice and comment proceeding. Moreover, as to substance, Congress has underscored that geographic averaging of residential service is integral to promoting universal service. Finally, AT&T should not be relieved of its commitment to rate integration because that policy has merely been recodified and expanded upon by Section 254(g). Similarly, Section 10(a)(1) of the Act prohibits using forbearance to foster unreasonable discrimination; e.g., for the "deintegration" of rates.

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COMMENTS OF THE STATE OF HAWAII

The State of Hawaii (the "State"), by its attorneys, hereby comments upon Section VI of the Commission's Notice of Proposed Rulemaking ("Notice"), released in this proceeding on March 25, 1996.[1]

I. SUMMARY

The State submits these initial comments primarily to address the implementation of Section 254(g) of the Communications Act (the "Act").[2] Congress has just added that provision to codify, and to expand upon the scope of, the Commission's longstanding policies mandating geographic rate averaging and rate integration. In codifying and expanding upon these policies, Congress has clearly stated that they are now all-inclusive elements of its plan

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[1] See Policy and Rules Concerning the Interstate, Interexchange Marketplace/ Implementation of Section 254(g) of the Communications Act of 1934, as amended, Notice of Proposed Rulemaking, CC Docket No. 96-61, FCC 96-123 (released March 25, 1996).

[2] These comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs. The State may comment upon Sections IV and V of the Notice on reply.

for promoting universal service, at just and reasonable rates, in an environment in which additional competitive forces will be unleashed. Both policies now clearly apply to all interexchange carriers and services.

The Notice proposes that the policies be enforced through a certification process; i.e., interstate, interexchange carriers would certify that they have complied with Section 254(g). Carriers also, of course, would be subject to the complaint process set forth in Section 208 of the Act. The proposal is insufficient to meet Congress's universal service goals. It would leave the Commission and the public without a realistic mechanism for verifying that carriers are in fact geographically averaging and integrating their rates.

To address this problem, the State urges the Commission to implement an annual reporting requirement that provides the Commission and the public basic, but sufficient, data necessary to enforce Section 254(g). A reporting requirement could be designed to both detect and deter violations of Section 254(g), whereas a certification process would do neither. Only by adopting this or some other pro-active enforcement mechanism can the Commission effectuate Congress's mandate that all Americans benefit from geographically averaged and integrated interexchange rates.

The Notice also proposes to relieve AT&T of its October 1995 commitments to provide the public five-days' advance notice of its intent to deaverage residential direct dial rates and to maintain integrated rates. The legislative history of Section 254(g) may provide AT&T relief from the five-days' notice commitment because, pursuant to it, AT&T would now be subject to more extensive requirements should it seek to deaverage its rates. The legislative history requires the Commission to find, before any carrier deaverages its rates, that the carrier

has met the three-part public interest standard set forth in Section 10 of the Communications Act. Substantively, however, AT&T cannot be relieved of its commitment to geographically average residential direct dial rates. That service will be a particularly critical component of universal service, and Section 254(g) requires that rates for it be geographically averaged.

Moreover, AT&T cannot be relieved of its commitment to rate integration, because that policy has always applied, and continues to apply, to all carriers under Section 202(a) of the Act which prohibits unjust geographic discrimination.[3] Section 254(g) does not supersede Section 202(a) or AT&T's commitment, but simply expands the role of the rate integration requirement as an element in promoting universal service.

II. BACKGROUND AND STATEMENT OF INTEREST

The State has long advocated that rate integration and geographic averaging are integral components of universal service and are essential to preventing unreasonable discrimination against locations like Hawaii. The policies are important to assure the economic and social integration of these locations into the social and economic fabric of the nation.

Although the State of Hawaii was admitted to statehood in 1959 "on an equal footing with the other States in all respects whatever . . .,"[4] its residents historically were deprived of certain telecommunications services available to other Americans and were charged

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[3] "It shall be unlawful for any common carrier...to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage." 47 U.S.C. § 202(a) (emphasis added).

[4] Act of March 18, 1959, Pub. L. No. 86-3, § 1, 73 Stat. 4.

more for those that were available.[5] For many years, Mainland carriers serving the State also established "separate" rate structures for their Hawaiian services. The rates, terms and conditions for services such as MTS, WATS, private line services and record services to and from Hawaii were different than those for comparable services offered on the Mainland.[6] This pervasive pattern of discrimination against the State "inhibited the free flow of communications" between Hawaii and the Mainland.[7] It adversely affected the State, its citizens, its economy, those who communicated with the State, and the nation as a whole. In addition, it suggested an unwarranted sense of "separation" -- not merely geographic -- between Hawaii and the rest of the United States.

In an effort to remedy this situation, the Commission adopted rate integration in 1972.[8] Rate integration requires that a carrier serving remote (or so-called offshore) locations employ the same rate structure or rate scheme for those locations that it employs for non-remote locations.

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[5] For example, Wide Area Telecommunications Service ("WATS") was first offered in the Mainland states in 1961, but did not become available in Hawaii until 1977. See American Telephone & Telegraph Co. (Long Lines Department), 66 F.C.C. 2d 9 (1977), on reconsideration, 69 F.C.C. 2d 1672 (1978), appeal dismissed sub. nom., MCI Telecommunications Corp. v. FCC, 627 F.2d 322 (D.C. Cir. 1980).

[6] Indeed, until 1980, Hawaii-Mainland record services were anomalously classified as "international" services under Section 222 of the Communications Act. This classification, inter alia, had the effect of precluding Western Union from providing domestic services to and from Hawaii. See Western Union International, Inc. v. FCC, 544 F.2d 87 (2d Cir. 1976), cert. denied, 434 U.S. 903 (1977). The classification was repealed by Public Law 96-590. Communications Act of 1934 - Hawaii, Pub. L. No. 96-590, 94 Stat. 3414 (1980).

[7] Establishment of Domestic Communications-Satellite Facilities by Non-Governmental Entities, 35 F.C.C. 2d 844, 856 (1972) ("Domsat Order").

[8] See generally id.; Domsat Order, 38 F.C.C. 2d 665 (1972) (on reconsideration).

Finding that the historic pattern of discriminatory treatment of Hawaii disserved the public interest, the Commission determined that "the goal of placing Hawaiian communications and charges on an equal footing with those of the contiguous forty-eight states was of fundamental importance."[9] The policy is rooted in Section 202(a) of the Act, which prohibits any unreasonable discrimination for like services, as well as any undue disadvantages based on a customer's locality.[10] Since 1972, the Commission's rate integration policy has become a fundamental component of national telecommunications policy. The Commission has reaffirmed the rule -- and its applicability to all carriers and all classes of service -- on numerous occasions.[11]

Geographic rate averaging is one type of rate structure that also greatly serves the public interest. A geographically averaged rate structure allows for the provision of the same services, at the same rates, for the same distance, regardless of the location of the terminal points. The policy ensures that "no person should be deprived of telecommunications service

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[9] Hawaiian Telephone Co. v. FCC, 589 F.2d 647, 656 (D.C. Cir. 1978), citing Domsat Order, 35 F.C.C. 2d at 856-59.

[10] See 47 U.S.C. § 202(a).

[11] See, e.g., Integration of Rates and Services, 61 F.C.C. 2d 380, 392 (1976) (ordering AT&T to implement full rate and service integration for MTS and WATS, as well as "for all other services it participates in providing to Hawaii, Alaska, and Puerto Rico/Virgin Islands"); Application of GTE Corp. and Southern Pacific Co. for Consent to Transfer Control of Southern Pacific Satellite Co., 94 F.C.C. 2d 235, 262-63 (1983) (requiring GTE, as a condition to acquiring Southern Pacific Satellite Company, to integrate into the rate structure prevailing on the Mainland all of "GTE Sprint's" current and future services to Hawaii).

at reasonable rates simply because of the high costs associated with serving the user's location."[12]

Historically, carriers have widely applied geographic averaging as a rate structure, although the Commission has primarily focused its attention on AT&T's implementation of that policy for MTS and WATS services.[13] That said, the Commission regularly has repeated its belief that geographically averaged rates are essential to consumer welfare.[14]

III. LEGISLATIVE HISTORY

In adopting Section 254(g), Congress has now codified the principle that both rate integration and geographic averaging are essential elements of the broader national objective of promoting universal service, and in doing so Congress has used expansive language to ensure the policies cover all interexchange carriers and services. The statute states:

> **SEC. 254. UNIVERSAL SERVICE.** . . . (g) INTEREXCHANGE AND INTERSTATE SERVICES. . . the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.[15]

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[12] Integration of Rates and Services, 96 F.C.C. 2d 567, 571 (1984).

[13] See, e.g., Integration of Rates and Services, Final Recommended Decision, CC Docket No. 83-1376, FCC 93J-2, at 19, 26 (released Oct. 29, 1993).

[14] See, e.g., Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 3132 (1989) ("[g]eographic rate averaging furthers our goal of providing a universal nationwide telecommunications network").

[15] Telecommunications Act of 1966, Pub. L. No. 104-104, 110 Stat. 56, 73 (1996) ("Telecommunications Act").

The provision makes no exceptions. It plainly covers all interexchange carriers. It plainly covers all interexchange services. The legislative history explains:

> New section 254(g) is intended to incorporate the policies of geographic rate averaging and rate integration of interexchange services in order to ensure that subscribers in rural and high cost areas throughout the Nation are able to continue to receive both intrastate and interstate interexchange services at rates no higher than those paid by urban subscribers. The Conferees intend the Commission's rules to require geographic rate averaging and rate integration . . . .[16]

The legislative history confirms Congress's intent that, to foster universal service, these two policies require broad application.

The maintenance of these policies, thus, is critical to ensuring that all Americans share in the benefits of technological improvements and the emergence of competition. As the Senate Report on this provision indicates:

> Maintaining affordable long distance service in high cost remote areas as well as in lower cost metropolitan areas benefits society as a whole by fostering a nationwide economic marketplace. The [Senate] Committee intends this provision to ensure that competition in telecommunications services does not come at the cost of higher rates for consumers in rural and remote areas.[17]

If properly enforced, rate integration and geographic rate averaging policies will continue to advance universal service by making telecommunications service available to Hawaii and other locations on the same terms, and at the same reasonable rates, that are available in urban and less remote areas.

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[16] H.R. Rep. No. 458, 104th Cong., 2d Sess., at 132 (1996) ("House Report") (emphasis added).

[17] S. Rep. No. 23, 104th Cong., 1st Sess., at 30 (1995).

IV. ENFORCEMENT OF SECTION 254(g) REQUIRES THE ADOPTION OF A REPORTING REQUIREMENT WHICH WILL CLEARLY DEMONSTRATE WHETHER INTEREXCHANGE CARRIERS ARE GEOGRAPHICALLY AVERAGING AND INTEGRATING THEIR RATES

In the Notice, the Commission acknowledges that it has "long supported a policy of geographic rate averaging for interstate, domestic interexchange services," and "[a]s with geographic rate averaging, the Commission has long maintained a rate integration policy for interexchange rates between the forty-eight contiguous states and various non-contiguous United States regions."[18] The Commission notes that "[a]s recently as the AT&T Reclassification Order, we reaffirmed our commitment to maintain our geographic rate averaging policy," and ". . . we reaffirmed our commitment to rate integration . . . ."[19]

Notwithstanding these longstanding policies, Congress's recent codification of them, and their acknowledged salutary benefits, the Notice suggests that the appropriate method of enforcing them is to simply require a certification of compliance from interexchange carriers. As justification, the Commission tentatively concludes that such a requirement will not burden carriers and that the complaint process under Section 208 of the Act can be relied upon to bring violations to the Commission's attention.[20] In other words, the consumer would bear the entire

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[18] Notice ¶¶ 66&74.

[19] Id. ¶¶ 66&75. Elsewhere in the Notice, the Commission further recognizes that, in addition to promoting universal service, geographic averaging and rate integration requirements inhibit the exercise of market power: "Because the prices a carrier can charge in a particular market are linked to the prices it charges in all other markets, it generally would not be profitable for a carrier to raise its prices throughout the nation (with a resulting loss of market share in some areas) to take advantage of market power between two particular cities." Notice ¶ 51 (citation omitted).

[20] Id. ¶¶ 70&78. Section 208 of the Communications Act allows any person to file a complaint with the Commission seeking redress for any conduct or omission of a carrier which violated the Act. 47 U.S.C. § 208.

burden of ascertaining whether a carrier's rates are discriminatory and of filing a complaint with the Commission alleging facts which describe such discrimination.

The Commission's assertion that this process can be relied upon to enforce these policies is suspect. The Notice itself recognizes that in today's market carriers have several incentives to deaverage and "deintegrate" rates: in noncompetitive regions, individual carriers (or groups of carriers) have an incentive to exercise their market power and raise rates above competitive levels absent effective enforcement of geographic rate averaging policies;[21] in highly competitive regions, nationwide carriers have an incentive to offer regionally discounted rates to meet local competition;[22] and, in these same competitive regions, as parties in the AT&T Reclassification proceeding indicated, carriers have an incentive to offer discount programs and bonuses in a regionally discriminatory manner.[23]

Congress addressed these problems by adopting Section 254(g). Now, the goal must be to adequately address these concerns through the Commission's broad enforcement authority.

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[21] Notice ¶ 51.

[22] Id. ¶ 70, n.154. The House Conference report on Section 254(g) indicates that already "the Commission has permitted interexchange providers to offer non-averaged rates for specific services in limited circumstances." House Report at 132 (emphasis added).

[23] Notice ¶ 72. The Notice asks whether such practice constitutes geographic deaveraging. Id. The State believes regional discounting is more appropriately considered deintegration. A particular rate structure, namely the discounted rate structure or discount program, is being offered on a regionally discriminatory basis. Such practice contravenes Section 254(g). All such discount rate plans should be made available, and the public made aware of such plans, in the carrier's service area.

The proposed certification/complaint process is insufficient. In the Notice, the Commission has tentatively concluded that nondominant interexchange carriers should not be required to file tariffs.[24] Accordingly, such carriers would no longer be required to make available to the public their rates and charges, or lists of their service offerings. There is a very real problem in assuring effective enforcement of these congressionally mandated policies in a regulatory regime where tariffs might not be required. How is a potential complainant, say a consumer in Hawaii, to know whether rates are deaveraged or rate integration impaired? This would seem to be an impossible task.

The Notice itself observes that, although from the carrier's perspective the interexchange market might be considered nationwide, customers view the market in terms of calls from one particular location to another particular location.[25] As a corollary, customers will only develop familiarity with their "home" markets. Thus, to substantiate a complaint under the Commission's proposal, each complainant would have to ascertain (presumably unpublished) prices not only in his or her own geographic market, but also in the distant geographic markets suspected of receiving unlawful, favorable treatment. A subscriber in Hawaii or the rural West, for example, would likely need to compare his or her rates, discount programs and available services to those offered by the same carrier in Eastern cities (assuming the subscriber could ascertain which Eastern cities to investigate). The State does not believe that, in adopting Section 254(g), Congress intended the public to encounter such enormous difficulty in enforcing the policies specifically mandated therein.

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[24] Id. ¶ 34.

[25] Id. ¶ 49.

Rather, the Commission must seriously consider all of its enforcement options if it is going to pursue its proposal to eliminate the mandatory filing of tariffs. At a minimum, the State recommends that the Commission adopt a basic annual reporting requirement which would demonstrate over the course of time whether carriers are complying with their geographic rate averaging and rate integration obligations.

The Notice already tentatively concludes that "carriers should be required to maintain at their premises price and service information regarding all of their interstate, interexchange offerings."[26] The Commission can adopt and build on this requirement, crafting in any number of ways a reporting requirement that meaningfully enforces Section 254(g). Indeed, the burden should be on those supporting the elimination of tariffs to assist in the first instance in the development of an effective mechanism for enforcing these two essential elements of universal service. States, consumer advocates and others can then comment upon such proposals to refine them. The critical fact is that without some pro-active enforcement mechanism the Commission will fail to meet its obligation to implement Section 254(g) so that all Americans benefit from increasing interexchange competition.

V. EXCEPTIONS TO THE GEOGRAPHIC RATE AVERAGING POLICY SHOULD ONLY BE CONSIDERED IN A NOTICE AND COMMENT INQUIRY CONDUCTED UNDER SECTION 10 OF THE ACT

Section 254(g)'s legislative history states:

> The conferees are aware that the Commission has permitted interexchange providers to offer non-averaged rates for specific services in limited circumstances (such as services offered under Tariff 12 contracts), and intend that the Commission, where appropriate, could continue to authorize limited

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[26] Id. ¶ 36.

> exceptions to the general geographic rate averaging policy using the authority provided by new section 10 of the Communications Act.[27]

Apparently, in this vein, the Notice asks whether certain circumstances might justify Commission forbearance from enforcing the geographic averaging requirement; for example, where a national interexchange carrier faces strong regional competition.[28]

Procedurally, the Commission's inquiry is out of place. The legislative history makes it clear that, before granting an exception to the geographic rate averaging policy, the Commission is to conduct an analysis along the lines set forth in new Section 10 of the Communications Act. That provision requires the Commission to make three specific findings before it forbears from applying any of its regulations or any provision of the Act. The Commission must find that enforcement of the regulation or statute is unnecessary to protect against unjust and unreasonable practices, that enforcement is unnecessary to protect consumers, and that forbearance is in the public interest.[29]

Given the gravity, specificity and timing of Congress's mandate that the Commission require the geographic averaging of rates, it would be inappropriate to consider the granting of an exception in anything other than in a notice and comment proceeding conducted in response a detailed request for such an exception.[30] The State will, in its reply comments, respond if in the initial comments there are any such detailed claims by carriers (or others) that

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[27] House Report at 132 (emphasis added).

[28] Notice ¶ 69.

[29] Telecommunication Act, 110 Stat. at 128.

[30] For example, this also would apply to any effort by AT&T to deaverage its rates, although as discussed below, the merits of any such request with regard to its residential direct dial rates would be dubious.

specific classes of carriers, specific services, or other classifications warrant some sort of exception from Section 254(g)'s coverage. Suffice it to say at this point, Congress made its intent clear as recently as February 1996 by codifying and expanding the Commission's geographic rate averaging policy.

It also should be noted that, although the legislative history of Section 254(g) indicates Congress contemplated the possibility of limited exemptions from the geographic averaging policy, there is no such suggestion with regard to rate integration.[31]

VI. AT&T CANNOT BE RELIEVED OF ITS OCTOBER 1995 COMMITMENT TO GEOGRAPHICALLY AVERAGE RESIDENTIAL DIRECT DIAL RATES

In the AT&T Reclassification proceeding, the Commission evidenced its commitment to geographic rate averaging and rate integration (and addressed concerns that AT&T would depart from these policies if reclassified) by accepting AT&T's October 1995 pledges to continue to integrate its rates and to provide five-days' notice of its intent to deaverage any residential direct dial rates.[32] Nonetheless, the Notice proposes to relieve AT&T of these specific obligations.[33] In support, the Notice observes with regard to geographic rate averaging AT&T's statement that its commitment to provide five-days' notice would continue

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[31] See House Report at 132.

[32] See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, FCC 95-427, ¶ 115 (released Oct. 23, 1995) ("AT&T Reclassification Order"), recon. pending.

[33] Notice at ¶¶ 73&79.

"for three years unless the Commission adopts rules addressing this issue for all carriers or there is a change in federal law addressing this issue."[34]

AT&T's commitment to provide five-days' notice is not the issue. The question is whether, in light of Section 254(g) and its legislative history, AT&T can ever by relieved of its commitment to geographically average residential direct dial service. Again, Congress has not changed the fundamental precepts of geographic rate averaging or rate integration. More precisely, Congress has codified and expanded upon these policies to ensure that they remain an integral component of the national plan for promoting universal service.

Moreover, Congress has expanded the scope of the requirement beyond residential services. The statutory provision does not provide for exceptions. To the extent one relies on the legislative history, it at best justifies allowing "limited exceptions" to geographic averaging to continue, "such as services offered under Tariff 12 contracts," and even then only if other conditions are met.[35] Under these circumstances, it is difficult to imagine how AT&T's residential direct dial service would be considered a "limited exception." Residential direct dial service, and in particular AT&T's such service, invariably will be one of the central elements of the nation's long term universal service plan. Any effort to deaverage the rates for such service would directly undermine Congress's universal service goals.

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[34] AT&T Reclassification Order, Appendix C, ¶ 3.

[35] House Report at 132.

VII. AT&T's RATE INTEGRATION COMMITMENT OF OCTOBER 1995 IS FULLY CONSISTENT WITH SECTION 254(g), AND THE CARRIER SHOULD NOT BE EXCUSED FROM IT

As to rate integration, AT&T stated that it would continue to abide by the Commission's various rate integration orders "until or unless those orders are superseded by Congressional or Commission action."[36] Again, those orders have not been superseded, but more accurately, the underlying policies have been further codified. AT&T, therefore, cannot be relieved of this commitment. It is entirely reasonable to hold that AT&T's individual commitment should remain binding, because that commitment has been affirmed by Section 254(g).

It also should be noted that relief is not available under Section 10 under any theory. Section 10's three-part test -- each element of which must be met -- indicates, in Section 10(a)(1), that forbearance would not sanction unreasonable discrimination. This is the same mandate, which forms the original basis of the rate integration, contained in Section 202(a) of the Act. Section 10 reemphasizes that this standard cannot be abridged.

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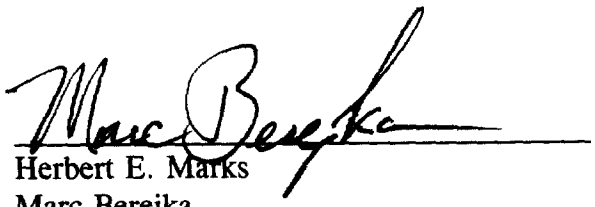
[36] AT&T Reclassification Order, Appendix C, ¶ 3.

VIII. CONCLUSION

For the foregoing reasons, the State of Hawaii urges the Commission to revise its proposal to enforce Section 254(g) of the Telecommunications Act of 1996: to, instead, adopt a more pro-active enforcement mechanism; to clarify that requests for exemptions from geographic rate averaging will be considered only within notice and comment proceedings; and to continue to hold AT&T to its geographic rate averaging and rate integration commitments.

Respectfully submitted,

THE STATE OF HAWAII



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